BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICK L. WINN	)	
Claimant	)	
	)	
VS.	)	
	)	
INTEGRATED PLASTICS SOLUTIONS	)	
Respondent	)	Docket No. 1,049,202
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	
	)	

ORDER

The Kansas Workers Compensation Fund (Fund) requests review of the April 27, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

Claimant alleges he slipped on ice and fell at work on December 29, 2009, injuring his back, neck, and right lower extremity. The ALJ found claimant was an employee at the time of the accident and awarded him both medical benefits and temporary total disability benefits. The ALJ assessed the benefits against the Fund.

The alleged employer, Integrated Plastics Solutions (Integrated), did not file a brief in this appeal.

The Fund argues the preliminary hearing Order should be reversed as claimant was terminated days before the accident and, therefore, he was not an employee when the accident occurred. The Fund maintains claimant is not credible as he described his accident in two different ways. The Fund's arguments are summarized, as follows:

> While it is conceded that in either circumstance the claimant would have been on the premises of the employer, the fact that the description of this accident

> is being described differently makes a great deal of difference in assessing the claimant's creditability [sic].
>
> It is respectfully submitted that the claimant simply has not proven the requisite elements to establish that he is entitld [sic] to workers compensation benefits. The testimony from the employer is clear that he was terminated on December 23, 2009, due to his relationship with the former manager. While it is conceded that the words "you're fired" were not uttered by Mr. Riley, it is not necessary to establish this level of certainty when severing the employment relationship. Accordingly, even taking the claimant for his word that he fell on Decmeber [sic] 29, 2009, he was not in the course and scope of his employment when this occurred. Likewise, this claim must fail due to the fact that the claimant has been unable to tell the same story regarding the circumstances relating to this accidental injury, and accordingly, simply cannot be believed.[1]

In short, the Fund, who was brought into this claim due to Integrated's lack of workers compensation insurance, requests the Board to reverse the Order.

The claimant argues that nobody advised him he was terminated before his accident, which occurred after he had clocked in and gone to his car for his work gloves. Accordingly, claimant requests the Order be affirmed.

The only issue before the Board at this juncture is whether claimant was an employee of Integrated when he fell at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

On the morning of December 29, 2009, claimant reported to work at Integrated's warehouse and clocked in. After receiving his job assignment, claimant realized he had forgotten his gloves and started to his car to get them. While exiting the building, claimant slipped and fell.[2] Claimant worked for about two hours with pain in his right foot and ankle until co-workers helped him into the office. They removed claimant's shoe and sock and concluded he had broken his ankle.

Integrated's warehouse manager, Nathan Smalley, drove claimant to the emergency room. Mr. Smalley advised the hospital that claimant's injury should be treated under workers compensation. Claimant had x-rays and a morphine injection and was told to see

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[1] Fund's Brief at 2-3 (filed May 24, 2010).

[2] P.H. Trans. at 7.

orthopaedist Dr. Pat D. Do for treatment. The x-rays of the right ankle showed claimant had a long spiral fracture of the distal fibula. Two days later claimant saw Dr. Do's physician assistant, who restricted claimant in such a manner that he could not work. In addition to his lower extremity, claimant also has complained to Dr. Do about neck and back pain from the fall.

As indicated above, the primary issue on this appeal is whether claimant was an employee of Integrated when he fell. Integrated and the Fund contend claimant had been terminated days before the accident. But claimant disagrees.

On December 21, 2009, the supervisor who had hired claimant (and with whom he rode to work from Eureka to El Dorado) was either terminated or walked off the job after being caught stealing company property. Claimant testified that one of Integrated's managers expressed concern that day about whether claimant had a ride home that evening but nothing was said about him being fired. Claimant believes he worked on both December 22 and 23 before being off for the Christmas holiday. Claimant did not work on Monday, December 28, as he was a funeral pallbearer but he resumed work on December 29, the day he fell.

Claimant also testified that Brian Riley, one of respondent's managers, telephoned him the day following the accident (December 30) and requested claimant prepare an accident report and take a urinalysis. Claimant denies being told in that conversation that he was terminated. Moreover, claimant maintains his wife was not informed that he had been terminated when she delivered one of his work status slips to respondent when he began receiving medical treatment. Claimant's wife testified she had not heard that her husband had been terminated until the day of the preliminary hearing.

A co-worker, Michael Phy, rode with claimant on their way home from work on December 23. Mr. Phy testified that Mr. Riley wished them a Merry Christmas before they left that day. Mr. Phy did not see either Mr. Smalley or Mr. Riley pull claimant to the side to talk. Moreover, on their ride home that evening claimant did not talk about being fired. Likewise, claimant did not mention on their way to work on Tuesday, December 29, that he had been terminated.

Brian Riley, on the other hand, testified that he told claimant on December 23 that he would no longer be employed after the Christmas holiday. Mr. Riley testified, in part:

> This took place on the 23rd. It was towards the end of the business day. And what I had asked Ricky, I said, do you have any knowledge about stealing. He said no. And I said, we have had a lot of stuff missing around here. And I said

> basically I said anybody that Mike's [the supervisor accused of stealing] hired is no longer an employee with us after the Christmas holiday.[3]

But Mr. Riley then testified he did not tell claimant 'you are fired' but, instead, told claimant that he did not have any more work for him. In addition, Mr. Riley did not tell claimant's immediate supervisor, Nathan Smalley, that claimant had been terminated.

Jack Gibbons, Integrated's operations manager, also testified in this claim. Mr. Gibbons admits he did not tell claimant that he had been fired (and did not know if anyone actually had) although a decision had been made to terminate claimant and Mr. Phy as they were not employees of Fresh Start, a temporary employment service.

Integrated's inventory coordinator, Thomas Wills, testified that on December 29 claimant reported that he had fallen in the parking lot while going to get something from his car. More importantly, Mr. Wills denied that before December 29 he had been told that claimant had been terminated. And that contradicts Mr. Gibbons testimony.

Mr. Smalley, who first learned of claimant's fall within about an hour of the incident, testified that claimant did not mention that he had fallen on or near the steps leading into the warehouse. More importantly, however, Mr. Smalley testified that when he spoke to Mr. Riley from the emergency room Mr. Riley did not express any surprise that claimant had reported to work that day. Mr. Smalley was promoted to warehouse manager shortly before Christmas in 2009 and he was not advised that claimant had been fired before claimant's accident. Moreover, Mr. Smalley confirmed that on two occasions following the accident claimant had dropped off his doctor's notes at the warehouse.

The ALJ found claimant was an employee of Integrated at the time of his accident. This Board Member agrees. Claimant's actions both before and following the accident indicate that he had not been advised of his pending termination and that he believed he was employed by the company. There is also evidence that indicates claimant has a reputation for honesty. Finally, the evidence establishes that on the date of accident none of the supervisors at the warehouse where claimant worked knew of his pending termination. Based upon those facts, the undersigned finds it is more probably true than not that claimant was an employee of Integrated at the time of his accident and, therefore, the preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[4] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as

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[3] Riley Depo. at 15.

[4] K.S.A. 44-534a.

permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.[5]

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated April 27, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Kendall R. Cunningham, Attorney for the Fund
John D. Clark, Administrative Law Judge

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[5] K.S.A. 2009 Supp. 44-555c(k).